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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DENNIS M. HELGUERO, Defendant - Appellant.	No. 05-50399 D.C. No. CR-02-00281-AHS-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted March 7, 2006
Pasadena, California

Before: McKEOWN and BERZON, Circuit Judges, and KING,** Senior Judge.

Dennis Helguero appeals his conviction under 18 U.S.C. § 922(a)(6) for knowingly making a false written statement in an attempt to purchase a firearm. The jury was instructed pursuant to *United States v. Jewell*, 532 F.2d 697, 704 (9th

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Cir. 1976) that the requirement of "knowingly" could be satisfied by deliberate ignorance. The instruction stated:

> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the defendant had been convicted in any court of a crime for which the Judge could have imprisoned defendant for more than one year, even if the Judge actually gave the defendant a shorter sentence, and deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that the defendant had not been convicted in any court of a crime for which the Judge could have imprisoned defendant for more than one year, even if the Judge actually gave defendant a shorter sentence, or if you find that the defendant was simply careless.

The jury convicted Helguero after receiving the instruction. Helguero appeals his conviction on two grounds: (1) the Department of Alcohol, Tobacco and Firearms (ATF) form he was required to fill out to purchase a gun was vague; (2) the *Jewell* instruction was improper.[1] We conclude that the form was not vague, but that the jury instruction was given in error, and the error was not harmless. We therefore reverse and remand.

I. **Vagueness of the ATF Form**

[1]Helguero also complains that his counsel was ineffective. As we reverse and remand for a new trial on other grounds, we do not decide the ineffective assistance of counsel claim.

Helguero argues that the question on the ATF form was unconstitutionally vague. For that reason, he maintains, he cannot be convicted for his answer, as that answer was premised on a misunderstanding of the question. This assertion fails.[2]

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws have two principal evils: (1) they do not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; and (2) they encourage arbitrary enforcement by not providing explicit standards for policemen, judges, and juries. *Id*. at 108-09; *accord Kolender v. Lawson*, 461 U.S. 352, 358 (1983).[3] Thus, if a statute is not sufficiently clear to provide guidance to citizens regarding how to avoid violating it or to provide authorities with consistent principles governing enforcement, a defendant cannot be punished for violating it.

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[2]We have never directly held that a government form can be unconstitutionally vague. We have, however, assumed without deciding that such a challenge is possible. *See United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003). We proceed on that assumption here.

[3]In addition, "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms." *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961)). Helguero has not suggested that any First Amendment interests are here implicated.

Question 9(c) asked, "Have you been convicted of a crime . . . ?" Helguero asserts that because the question did not ask whether he had *ever* been convicted of a crime, it was a fair interpretation to read the question as asking if he had been convicted of a crime that was still validly on his record. We disagree. The question provided sufficient notice to Helguero of the scope of the inquiry. Reading in what is not there does not make the question vague. For the same reason, the question does not give rise to any realistic likelihood of arbitrary enforcement. The Form is therefore not unconstitutionally vague.

II. **The Jury Instruction**

Both sides frame the next question in this case as whether a *Jewell* instruction was proper. *Jewell* instructions are appropriate only in narrow circumstances. *See, e.g.*, *United States v. Fulbright*, 105 F.3d 443, 447 (9th Cir. 1997); *United States v. Kelm*, 827 F.2d 1319, 1323-24 (9th Cir. 1987); *United States v. Garzon*, 688 F.2d 607, 609 (9th Cir. 1982). "There must be evidence that the defendant purposely avoided learning all the facts *in order to have a defense in the event of being arrested and charged*. It is not enough that the defendant was mistaken, recklessly disregarded the truth or negligently failed to inquire." *Kelm*, 827 F.2d at 1324 (emphasis added) (internal citations omitted).

There is no evidence whatsoever that Helguero consciously avoided determining whether he "had been convicted in any court of a crime for which the Judge could have imprisoned [him] for more than one year, even if the Judge actually gave [him] a shorter sentence." Helguero had not raised any defense related to whether he knew the potential sentence for the crime for which he had been convicted. On the contrary, Helguero *admitted* to such knowledge; indeed, his *actual* sentence was for more than one year. Thus, there was simply no evidentiary basis for the *Jewell* instruction given.

Helguero's actual defense was that he did not know that his prior conviction *remained* valid. If Helguero's story was believed, then the jury would have had to conclude that he operated under a mistaken view regarding the continuing significance of prior convictions or the reach of the questions on the form. If Helguero's story were not believed, then the jury would have had to conclude that he *actually knew* that he was lying on the form. In either event, there was no basis in the evidence for a conclusion that Helguero deliberately avoided knowing whether he had been convicted of a crime with the requisite sentence. *See id.* Yet, the instruction allowed the jury to find that Helguero acted knowingly if he knew there had been a prior conviction *in the first place* for which he could have been

imprisoned for more than one year. The *Jewell* instruction was therefore improper. *See id.*

The government maintains that the instruction was at worst harmless error, because Helguero was not entitled to raise his ignorance defense. That defense, the government maintains, would have "essentially allowed the jury to conclude that [the defendant] was . . . ignorant of the law." *Fulbright*, 105 F.3d at 447. Although that is true, we conclude that the current circumstance is one of the rare instances in which ignorance of the law *is* a defense, so instructing the jury otherwise was not harmless.

As we have clarified, "[t]here are . . . two categories of cases in which a defense of ignorance of law is permitted even though it is not specifically written into the criminal statute." *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982). The first consists of cases in which the defendant is ignorant of an independently determined legal status. "In such a case, the mistake of the law is for practical purposes a mistake of fact." *Id*. The second "involves prosecution under complex regulatory schemes that have the potential of snaring unwitting violators." *Id*. at 1295.

Helguero's case fits neatly in the first category of cases. His contention is that because he misunderstood the law concerning the continuing effect of a

conviction, he made a mistake of fact regarding whether his conviction was an appropriate answer to the question on the Form. Helguero's claimed mistake can therefore be seen as a mistake of fact, albeit one that seems entirely illogical.

In the present circumstances, however, Helguero's mistake could provide a defense if the jury found that he truly believed his conviction was no longer valid, and thus was not pertinent to the question asked. To convict a person for "knowingly" making a false statement, the government need not prove that the defendant knew he was violating the law, but it must prove that he knew that the statement he was making—including a statement regarding his legal status or history—was false. *See United States v. Williams*, 685 F.2d 319, 321 (9th Cir. 1982). If the jury agreed that Helguero held an honest belief that his prior conviction no longer existed and honestly believed the answer he placed on the Form, then he could not be convicted of *knowingly* making a false statement. *United States v. Barker*, 967 F.2d 1275, 1278 (9th Cir. 1991) ("To be false, a claim must not only be inaccurate but consciously so.").

The jury, however, was not given the chance to decide whether it *did* believe Helguero. Instead, after struggling for a while with the original instructions concerning knowledge of the falsity of the answer on the Form, the jury could not decide the knowledge question—indicating, perhaps, some propensity to believe

his ignorance defense. When the jury sent out a question inquiring as to the meaning of "knowingly," they were then given a *Jewell* instruction, and one that spoke only of deliberate ignorance with regard to Helguero's knowledge of the original nature of his prior conviction.

The instruction ignored Helguero's defense: Again, he never disputed that he had *ever* been convicted of a crime. He disputed, instead, whether the question was *asking* about such an old conviction. Under the *Jewell* instruction given, the jury could well have understood that if Helguero knew of or was aware of a high probability that he had been convicted of a crime with the requisite sentence, any mistake as to the *present* pertinence of that conviction as an answer to the question asked was irrelevant to the "knowingly" element of the crime.

This understanding could well have driven the conviction. The jury began its deliberations at 2:40 p.m. on April 7. The next morning, by 10:30 a.m., the jury sent several notes to the judge, including the note regarding "knowledge." The jury was reinstructed at 11:45 a.m. on April 8 and returned with a verdict at 3:20 p.m.[4] The jury therefore returned the conviction only after receiving the new instruction in response to its query about "knowingly," and did so fairly promptly

[4]The record does not reflect whether the jury took a break for lunch between 11:45 a.m. and 3:45 p.m.

thereafter. As that instruction could easily be read to foreclose Helguero's ignorance defense, a defense as to which Helguero presented sufficient evidence, the instructional error was not harmless.

REVERSED AND REMANDED